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January 7, 1991

Mr. James L. Morgan
Assistant Attorney General
Environmental Control Division
Office of Illinois Attorney
General
500 South Second Street
Springfield, Illinois 62706

RECEIVED
DIVISION OF LEGAL COUNSEL
JAN 9 8 1991
ENVIRONMENTAL PROTECTION
AGENCY

Re: Sauget Site 1, Area I

Dear Mr. Morgan:

As you may recall, we represent Magna Trust Company, formerly Illinois State Trust Company (the "Trust Company"). Your office and the Illinois Environmental Protection Agency ("IEPA") have identified the Trust Company as a potentially responsible party ("PRP") with respect to the above-referenced site. In a letter to you dated July 3, 1990, which included affidavits and attachments, we expressed and substantiated the position of the Trust Company that its only connection with the above-referenced site was that of an Illinois land trustee and that, therefore, the Trust Company should be removed from the list of PRP's.

In a letter dated October 5, 1990, you responded by saying that, due to the existence of "unresolved issues," you could not grant the Trust Company's request "at this preliminary stage of the proceedings." Upon receipt of your letter, the Trust Company conducted additional investigation which we believe resolves the factual issues cited in your letter. Accordingly, we take this opportunity to provide you with additional information and to request your reconsideration of the Trust Company's status as a PRP with respect to the above-referenced site.

The first point raised in your letter involves the proper legal interpretation of Senate Bill 1702's exemption for land trusts. You point out that Ill. Rev. Stat. Ch. 111 1/2, par. 1022.2(f) distinguishes between those who currently own or operate a facility where a release occurred and those who owned or operated the facility at the time of disposal. You then state that it "could be argued" that the land trust exemption in Senate

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Bill 1702 applies only to current owners or operators and, therefore, may be unavailable to the Trust Company. You do not state that such an argument has been accepted by the State.

The land trust exemption is contained within the definition of "owner or operator." See § 22.2(h)(2)(C). There is absolutely nothing in that section to suggest that the legislature intended to treat land trusts previously holding title to property different from land trusts currently holding title to property. To the contrary, the definition simply states that the term "owner or operator" means "the person owning the beneficial interest in the land trust." The relevant liability provision, § 22.2(f), speaks in terms of any person who owned or operated the facility on which there was a release. We submit it would be ludicrous for the other PRP's to argue that the legislature intended that a person who owned a facility is not an "owner or operator." Nor are we aware of anything in the legislative history of Senate Bill 1702 which supports the contention that such a significant distinction should be drawn on the basis of tense alone.

The second legal point raised in your letter regards the issue of CERCLA liability. I appreciate you enclosing a copy of H.R. 4494. We will, of course, continue to watch this and related bills closely in the next legislative session. However, regardless of whether H.R. 4494 passes, the extent to which a trustee which merely holds title to real property can be held personally liable is, of course, very much "up in the air." We assume that the State exercises its administrative authority under the Illinois Environmental Protection Act. We submit, therefore, that the liability provision of that Act, not CERCLA, should govern this issue. Of course, if any private party feels that it has a cause of action for contribution against the Trust Company under CERCLA, it is their prerogative to pursue the same; however, we do not believe that is sufficient justification for the Illinois Attorney General to contradict the intent of the Illinois legislature.

We do, however, understand your concern with respect to the factual issues raised in your letter. You acknowledged that the circumstances described in our letter of July 3, 1990 lend credence to the assertion that a land trust was involved. You indicated, however, that you felt there was still an element of doubt which may be reduced if we could provide a copy of the land trust agreement forms used during the time period at issue (1948-1952).

After some investigation, the Trust Company has located an actual agreement executed on the standard form. A copy of

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that agreement is enclosed (with the names of the beneficiaries deleted). As you will see, the agreement establishes the elements contained in the definition of land trust (e.g., a trust of land held for the benefit of the beneficiaries, under which title is held in the trustee, where the beneficiaries, whose interest is one of personal property only, retain the right to manage and control the property and to receive the proceeds thereof). See Ill. Rev. Stat. 1989, Ch. 148, par. 82 2(a). For your convenience, I have highlighted relevant provisions of the trust agreement.

It is my hope that this information, when considered along with the other information previously provided to you, will remove any doubt concerning the Trust Company's status as a land trustee. However, we also enclose herewith an affidavit from Paul Sauget confirming the fact that the Trust Company was a mere land trustee and was not involved in the operation of the property. You may recall from our previous correspondence that Mr. Sauget was the grantor who conveyed the property at issue into the land trust for which the Trust Company acted as trustee. Further, Mr. Sauget's family members were beneficiaries and grantees of the land trust (see detailed explanation in our letter of July 3, 1990).

The final point raised in your letter was that financial institutions acting as land trustees may also have a relationship to the site as a lender. You referred to the Fleet Factors' case for the proposition that a lender can become a PRP if it exercises a degree of control over a site. Please note that Mr. Sauget's affidavit states that he does not recall the Trust Company having any lending relationship with respect to the property. Mr. Sauget's affidavit also recites that, consistent with the form of land trust agreement used during that period, the Trust Company had no right to manage, operate or control and did not, in fact, manage operate or control the property. Further, I am informed by Chairman of the Trust Company that during the time at issue (1948-1952) the Trust Company did not conduct any lending operations. Accordingly, there is absolutely no basis to speculate that the Trust Company may have had some lending relationship which, when coupled with its duty as a land trustee, would constitute a sufficient degree of control to impose liability.

Based upon the foregoing, we respectfully request that the State reconsider our request to delete the Trust Company from the State's list of PRP's with respect to the above-referenced

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site. If you have any questions or desire any additional information, please contact the undersigned. We look forward to your response.

Very truly yours,

THOMPSON & MITCHELL

By



Peter S. Strassner

PSS/bjc

Enclosures

cc: Lowell G. Burger, Esq. (w/encs.)
Bruce Carlson, Esq. (w/encs.)

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